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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LEVAR EMERSON JONES, Plaintiff and Appellant, v. PATRICK WILLS, as Captain, etc., et al., Defendants and Respondents.	B211135 (Los Angeles County Super. Ct. No. NC051369)

APPEAL from an order of the Superior Court of Los Angeles County. Douglas M. Haigh, Judge. Affirmed.

LeVar Emerson Jones, in pro. per., for Plaintiff and Appellant.

Robert E. Shannon, City Attorney, and Barry M. Meyers, Deputy City Attorney, for Defendants and Respondents.

* * * * * *

Plaintiff and appellant LeVar Emerson Jones appeals from an order dismissing without prejudice a complaint he filed against defendants and respondents Patrick Wills, a captain with the Long Beach Fire Department (Wills), and the Long Beach Fire Department. The trial court ordered the case dismissed because of appellant's failure to file a proper proof of service. Deeming the order of dismissal an appealable judgment, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2008, appellant filed a complaint against Wills and the Long Beach Fire Department[1] alleging claims for invasion of privacy and intentional infliction of emotional distress. Appellant's claims were based on an alleged surreptitious recording of his interview with an arson investigator. Together with his complaint and legal arguments in support thereof, appellant filed a proof of service by mail indicating that Elliott Lew Griffins had mailed to Wills copies of a summons, the complaint, memoranda of points and authorities, and exhibits.

On August 18, 2008, the matter came before the trial court on an order to show cause re: proof of service. Because appellant had not filed a proper proof of service, the trial court dismissed the complaint without prejudice. This appeal followed.

DISCUSSION

I. Appealability.

Preliminarily, we address the threshold issue of appealability. (See *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 436 ["'since the question of appealability goes to our jurisdiction, we are dutybound to consider it on our own motion'"].) "[A] reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment." (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th

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[1] The Long Beach Fire Department is not a separate entity from the City of Long Beach. There is no indication in the record that the City was served with a summons and complaint.

688, 696.) A dismissal order is appealable as a final judgment only where the order complies with Code of Civil Procedure section 581d, which provides in part that "[a]ll dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes . . . ." An unsigned minute order is therefore not an appealable order. (*Munoz v. Florentine Gardens* (1991) 235 Cal.App.3d 1730, 1731; *Graski v. Clothier* (1969) 273 Cal.App.2d 605, 606–607.)

Though we could dismiss this matter as an appeal from a nonappealable order, the court in *Daar v. Yellow Cab. Co* (1967) 67 Cal.2d 695, 699, explained that "'an order of dismissal is to be treated as a judgment for the purposes of taking an appeal when it finally disposes of the particular action and prevents further proceedings as effectually as would any formal judgment.' [Citations.]" Thus, we will exercise our discretion to treat the minute order as a final judgment from which an appeal lies. (See *Thaler v. Household Finance Corp.* (2000) 80 Cal.App.4th 1093, 1098.)

II. The Trial Court Properly Exercised Its Discretion in Dismissing the Complaint.

We review the trial court's dismissal of a complaint for an abuse of discretion. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.) In his opening brief, appellant fails to make any argument against or even address the dismissal, instead arguing the merits of his individual causes of action. Accordingly, we deem appellant to have abandoned any challenge to the dismissal. Courts ordinarily treat an appellant's failure to raise an issue in his or her opening brief as a waiver of that challenge. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; *Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361; see also *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316, fn. 7 ["'Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived'"].) Nor can we conclude that appellant's belated attempt to address the dismissal in his reply brief obviates his waiver. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894–895, fn. 10 [arguments raised by appellant for the first time in reply brief

generally not considered, absent good reason for failing to present them earlier]; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [issue raised for first time in reply brief generally not considered "'because such consideration would deprive the respondent of an opportunity to counter the argument'"].)

But even if we were to find no waiver, we would conclude that the trial court acted within its discretion in dismissing the complaint. The trial court ordered the complaint dismissed without prejudice because there was no proof of service filed by August 2008. California Rules of Court, rule 3.110(b)[2] provides in part: "The complaint must be served on all named defendants and proofs of service on those defendants must be filed with the court within 60 days after the filing of the complaint." Rule 3.110(f) states: "If a party fails to serve and file pleadings as required under this rule, and has not obtained an order extending time to serve its pleadings, the court may issue an order to show cause why sanctions shall not be imposed."

Here, appellant purported to serve the summons and complaint by mail. Even setting aside that there is no copy of a summons in the record, appellant failed to demonstrate that he complied with the service by mail requirements set forth in Code of Civil Procedure section 415.30.[3] That statute provides in relevant part: "(a) A summons may be served by mail as provided in this section. A copy of the summons and of the complaint shall be mailed (by first-class mail or airmail, postage prepaid) to the person to be served, together with two copies of the notice and acknowledgment provided for in subdivision (b) and a return envelope, postage prepaid, addressed to the sender." (§ 415.30, subd. (a).) Subdivision (b) of section 415.30 provides the specific language that must be included in the notice, while subdivision (c) states that "[s]ervice of a summons pursuant to this section is deemed complete on the date a written acknowledgment of receipt of summons is executed, if such acknowledgment thereafter is returned to the sender."

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[2] All further rules citations are to the California Rules of Court.

[3] All further statutory citations are to the Code of Civil Procedure.

Section 417.10 outlines the requirements for establishing proof of service. That section provides in relevant part: "Proof that a summons was served on a person within this state shall be made: [¶] (a) If served under Section . . . 415.30, by the affidavit of the person making the service showing the time, place, and manner of service and facts showing that the service was made in accordance with this chapter. . . . [¶] If service is made by mail pursuant to Section 415.30, proof of service shall include the acknowledgment of receipt of summons in the form provided by that section or other written acknowledgment of receipt of summons satisfactory to the court." (§ 417.10, subd. (a).)

The burden of proof of proper service of process is on the plaintiff. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441, fn. 14; *Taylor-Rush v. Multitech Corp.* (1990) 217 Cal.App.3d 103, 110.) Here, it is undisputed that appellant provided neither Wills's acknowledgment of receipt of summons nor any other type of written acknowledgement. (See *Guardianship of Debbie V.* (1986) 182 Cal.App.3d 781, 787 ["Because no acknowledgment of receipt of notice was executed, as required by Code of Civil Procedure section 415.30, the mailed service was not completed"].)

In his reply brief, appellant argues that Wills has never demonstrated he did not receive the complaint. But again, the burden is on appellant. As explained by the court in *Taylor-Rush v. Multitech Corp., supra,* 217 Cal.App.3d at page 111, "[t]he notice requirement is not satisfied by actual knowledge of the action without service conforming to the statutory requirements, which are to be strictly construed." We likewise reject appellant's argument that he should not be held to the statutory requirements because he is unrepresented by counsel. "Under the law, a party may choose to act as his or her own attorney. [Citations.] '[S]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]' [Citation.] Thus, as is the case with attorneys, pro. per. litigants must follow correct rules of procedure. [Citations.]" (*Nwosu v. Uba, supra,* 122 Cal.App.4th at pp. 1246–1247.)

Because appellant failed to file a proper proof of service within 60 days after filing his complaint, the trial court properly exercised its discretion in dismissing the action without prejudice.

DISPOSITION

The order dismissing appellant's complaint without prejudice, which we have treated as a judgment for purposes of appeal, is affirmed. Parties to bear their own costs on appeal.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST